

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR  
HOUSE BILLS 501, 506 & 613

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

AN ACT

RELATING TO WORKERS' COMPENSATION; AMENDING A CERTAIN  
DEFINITION; AMENDING THE RESIDUAL PHYSICAL CAPACITY TABLE;  
PROVIDING FOR INCREASES IN ATTORNEY FEES AND ADVANCED DISCOVERY  
COSTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 52-1-25 NMSA 1978 (being Laws 1987,  
Chapter 235, Section 11, as amended) is amended to read:

"52-1-25. PERMANENT TOTAL DISABILITY. --

A. As used in the Workers' Compensation Act,  
"permanent total disability" means:

(1) the permanent and total loss or loss of  
use of both hands or both arms or both feet or both legs or  
both eyes or any two of them; or

(2) a brain injury that results in a permanent

impairment of at least thirty percent or more as determined by the current American medical association guide to the evaluation of permanent impairment.

B. In considering a claim for total disability, a workers' compensation judge shall not receive or consider the testimony of a vocational rehabilitation provider offered for the purpose of determining the existence or extent of disability. "

Section 2. Section 52-1-26.4 NMSA 1978 (being Laws 1990 (2nd S.S.), Chapter 2, Section 15) is amended to read:

"52-1-26.4. PARTIAL DISABILITY DETERMINATION

~~[CALCULATION]~~-- PHYSICAL CAPACITY MODIFICATION. --

A. The range of the physical capacity modification is one to eight.

B. The award of points to a worker shall be based upon the difference between the physical capacity necessary to perform the worker's usual and customary work and the worker's residual physical capacity. The award of points shall be based upon the following table:

RESIDUAL PHYSICAL CAPACITY

		S	L	M	H
PRE-INJURY	S	1	1	1	1
PHYSICAL CAPACITY	L	[2] <u>3</u>	1	1	1
(USUAL AND	M	[4] <u>5</u>	[2] <u>3</u>	1	1
CUSTOMARY WORK)	H	8	[4] <u>5</u>	[2] <u>3</u>	1.

underscored material = new  
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1 C. For the purposes of this section:

2 (1) "H" or "heavy" means the ability to lift  
3 over fifty pounds occasionally or up to fifty pounds  
4 frequently;

5 (2) "M" or "medium" means the ability to lift  
6 up to fifty pounds occasionally or up to twenty-five pounds  
7 frequently;

8 (3) "L" or "light" means the ability to lift  
9 up to twenty pounds occasionally or up to ten pounds  
10 frequently. Even though the weight lifted may be only a  
11 negligible amount, a job is in this category when it requires  
12 walking or standing to a significant degree or when it involves  
13 sitting most of the time with a degree of pushing and pulling  
14 of arm or leg controls or both; and

15 (4) "S" or "sedentary" means the ability to  
16 lift up to ten pounds occasionally or up to five pounds  
17 frequently. Although a sedentary job is defined as one that  
18 involves sitting, a certain amount of walking and standing is  
19 often necessary in carrying out job duties. Jobs are sedentary  
20 if walking and standing are required only occasionally and  
21 other sedentary criteria are met.

22 D. The determination of a worker's residual  
23 physical capacity shall be made by a health care provider  
24 defined in Subsection C, E or G of Section 52-4-1 NMSA 1978.  
25 If the worker or employer disagrees on who shall make this

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1 determination, the dispute shall be resolved in accordance with  
2 the provisions set forth in Section 52-1-51 NMSA 1978. "

3 Section 3. Section 52-1-54 NMSA 1978 (being Laws 1987,  
4 Chapter 235, Section 24, as amended) is amended to read:

5 "52-1-54. FEE RESTRICTIONS--APPOINTMENT OF ATTORNEYS BY  
6 THE DIRECTOR OR WORKERS' COMPENSATION JUDGE--DISCOVERY COSTS--  
7 OFFER OF JUDGMENT--PENALTY FOR VIOLATIONS. --

8 A. It is unlawful for any person to receive or  
9 agree to receive any fees or payment directly or indirectly in  
10 connection with any claim for compensation under the Workers'  
11 Compensation Act except as provided in this section.

12 B. In all cases where the jurisdiction of the  
13 workers' compensation administration is invoked to approve a  
14 settlement of a compensation claim under the Workers'  
15 Compensation Act, the director or workers' compensation judge,  
16 unless the claimant is represented by an attorney, may in his  
17 discretion appoint an attorney to aid the workers' compensation  
18 judge in determining whether the settlement should be approved  
19 and, in the event of an appointment, a reasonable fee for the  
20 services of the attorney shall be fixed by the workers'  
21 compensation judge, subject to the limitation of Subsection I  
22 of this section.

23 C. In all cases where the jurisdiction of the  
24 workers' compensation administration is invoked to approve a  
25 settlement of a compensation claim under the Workers'

1 Compensation Act and the claimant is represented by an  
 2 attorney, the total amount paid or to be paid by the employer  
 3 in settlement of the claim shall be stated in the settlement  
 4 papers. The workers' compensation judge shall determine and  
 5 fix a reasonable fee for the claimant's attorney, taking into  
 6 account any sum previously paid, and the fee fixed by the  
 7 workers' compensation judge shall be the limit of the fee  
 8 received or to be received by the attorney in connection with  
 9 the claim, subject to the limitation of Subsection I of this  
 10 section.

11 D. The cost of discovery shall be borne by the  
 12 party who requests it. If, however, the claimant requests any  
 13 discovery, the employer shall advance the cost of paying for  
 14 discovery up to a limit of [~~one thousand dollars (\$1,000)~~]  
 15 three thousand dollars (\$3,000). If the claimant substantially  
 16 prevails on the claim, as determined by a workers' compensation  
 17 judge, any discovery cost advanced by the employer shall be  
 18 paid by that employer. If the claimant does not substantially  
 19 prevail on the claim, as determined by a workers' compensation  
 20 judge, the employer shall be reimbursed for discovery costs  
 21 advanced according to a schedule for reimbursement approved by  
 22 a workers' compensation judge. On July 1, 2004 and on July 1  
 23 of each subsequent year, the limit for costs advanced pursuant  
 24 to this subsection shall be adjusted by multiplying the limit  
 25 for the previous fiscal year by the change in the consumer

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1 price index over the immediately preceding calendar year. The  
2 director shall publish the adjusted limit no later than the  
3 March 1 preceding the beginning of the fiscal year. As used in  
4 this subsection, "consumer price index" means the consumer  
5 price index for the United States for all items as published by  
6 the United States department of labor.

7 E. In all cases where compensation to which any  
8 person is entitled under the provisions of the Workers'  
9 Compensation Act is refused and the claimant thereafter  
10 collects compensation through proceedings before the workers'  
11 compensation administration or courts in an amount in excess of  
12 the amount offered in writing by an employer five business days  
13 or more prior to the informal hearing before the  
14 administration, [~~then~~] the compensation to be paid the attorney  
15 for the claimant shall be fixed by the workers' compensation  
16 judge hearing the claim or the courts upon appeal in the amount  
17 the workers' compensation judge or courts deem reasonable and  
18 proper, subject to the limitation of Subsection I of this  
19 section. In determining and fixing a reasonable fee, the  
20 workers' compensation judge or courts shall take into  
21 consideration:

- 22 (1) the sum, if any, offered by the employer:  
23 (a) before the worker's attorney was  
24 employed;  
25 (b) after the attorney's employment but

1 before proceedings were commenced; and

2 (c) in writing five business days or  
3 more prior to the informal hearing;

4 (2) the present value of the award made in the  
5 worker's favor; and

6 (3) any failure of a party to participate in a  
7 good-faith manner in informal claim resolution methods adopted  
8 by the director.

9 F. After a recommended resolution has been issued  
10 and rejected, but more than ten days before a trial begins, the  
11 employer or claimant may serve upon the opposing party an offer  
12 to allow a compensation order to be taken against him for the  
13 money or property or to the effect specified in his offer, with  
14 costs then accrued, subject to the following:

15 (1) if, within ten days after the service of  
16 the offer, the opposing party serves written notice that the  
17 offer is accepted, either party may then file the offer and  
18 notice of acceptance together with proof of service thereof,  
19 and thereupon that compensation order may be entered as the  
20 workers' compensation judge may direct. An offer not accepted  
21 shall be deemed withdrawn, and evidence thereof is not  
22 admissible except in a proceeding to determine costs. If the  
23 compensation order finally obtained by the party is not more  
24 favorable than the offer, that party ~~must~~ shall pay the costs  
25 incurred by the opposing party after the making of the offer.

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1 The fact that an offer has been made but not accepted does not  
2 preclude a subsequent offer;

3 (2) when the liability of one party to another  
4 has been determined by a compensation order, but the amount or  
5 extent of the liability remains to be determined by further  
6 proceedings, the party adjudged liable may make an offer, which  
7 shall have the same effect as an offer made before trial if it  
8 is served within a reasonable time not less than ten days prior  
9 to the commencement of hearings to determine the amount or  
10 extent of liability;

11 (3) if the employer's offer was greater than  
12 the amount awarded by the compensation order, the employer  
13 shall not be liable for his fifty percent share of the  
14 [~~attorneys'~~] attorney fees to be paid the worker's attorney and  
15 the worker shall pay one hundred percent of the [~~attorney's~~]  
16 attorney fees due to the [~~workers'~~] worker's attorney; and

17 (4) if the worker's offer was less than the  
18 amount awarded by the compensation order, the employer shall  
19 pay one hundred percent of the [~~attorneys'~~] attorney fees to be  
20 paid the worker's attorney, and the worker shall be relieved  
21 from any responsibility for paying any portion of the worker's  
22 attorney fees.

23 G. In all actions arising under the provisions of  
24 Section 52-1-56 NMSA 1978 where the jurisdiction of the  
25 workers' compensation administration is invoked to determine

1 the question whether the claimant's disability has increased or  
 2 diminished and the claimant is represented by an attorney, the  
 3 workers' compensation judge or courts upon appeal shall  
 4 determine and fix a reasonable fee for the services of the  
 5 claimant's attorney only if the claimant is successful in  
 6 establishing that his disability has increased or if the  
 7 employer is unsuccessful in establishing that the claimant's  
 8 disability has diminished. The fee when fixed by the workers'  
 9 compensation judge or courts upon appeal shall be the limit of  
 10 the fee received or to be received by the attorney for services  
 11 in the action, subject to the limitation of Subsection I of  
 12 this section.

13 H. In determining reasonable [~~attorneys'~~] attorney  
 14 fees for a claimant, the workers' compensation judge shall  
 15 consider only those benefits to the worker that the attorney is  
 16 responsible for securing. The value of future medical benefits  
 17 shall not be considered in determining [~~attorneys'~~] attorney  
 18 fees.

19 I. [~~Attorneys'~~] Attorney fees, including, but not  
 20 limited to, the costs of paralegal services, legal clerk  
 21 services and any other related legal services costs on behalf  
 22 of a claimant or an employer for a single accidental injury  
 23 claim, including representation before the workers'  
 24 compensation administration and the courts on appeal, shall not  
 25 exceed [~~twelve thousand five hundred dollars (\$12,500)] sixteen~~

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1 thousand five hundred dollars (\$16,500); provided that on July  
2 1, 2004 and July 1 of each subsequent year, the limit for  
3 attorney fees shall be adjusted by multiplying the limit for  
4 the previous fiscal year by the change in the consumer price  
5 index over the immediately preceding calendar year. The  
6 director shall publish the adjusted limit no later than the  
7 March 1 preceding the beginning of the fiscal year. As used in  
8 this subsection, "consumer price index" means the consumer  
9 price index for the United States for all items as published by  
10 the United States department of labor. This limitation applies  
11 whether the claimant or employer has one or more attorneys  
12 representing him and applies as a cumulative limitation on  
13 compensation for all legal services rendered in all proceedings  
14 and other matters directly related to a single accidental  
15 injury to a claimant. The workers' compensation judge may  
16 exceed the maximum amount stated in this subsection in awarding  
17 a reasonable [attorneys'] attorney fee if he finds that a  
18 claimant, an insurer or an employer acted in bad faith with  
19 regard to handling the injured worker's claim and the injured  
20 worker or employer has suffered economic loss as a result.  
21 However, in no case shall this additional amount exceed two  
22 thousand five hundred dollars (\$2,500). As used in this  
23 subsection, "bad faith" means conduct by the claimant, insurer  
24 or employer in the handling of a claim that amounts to fraud,  
25 malice, oppression or willful, wanton or reckless disregard of

1 the rights of the worker or employer. Any determination of bad  
2 faith shall be made by the workers' compensation judge through  
3 a separate fact-finding proceeding.

4 J. Except as provided for in Paragraphs (3) and (4)  
5 of Subsection F of this section, the payment of a claimant's  
6 [~~attorneys'~~] attorney fees determined under this section shall  
7 be shared equally by the worker and the employer.

8 K. It is unlawful for any person except a licensed  
9 attorney to receive or agree to receive any fee or payment for  
10 legal services in connection with any claim for compensation  
11 under the Workers' Compensation Act.

12 L. Nothing in this section applies to agents,  
13 excluding attorneys, representing employers, insurance carriers  
14 or the subsequent injury fund in any matter arising from a  
15 claim under the Workers' Compensation Act.

16 M. No [~~attorneys'~~] attorney fees shall be paid  
17 until the claim has been settled or adjudged.

18 N. Every person violating the provisions of this  
19 section [~~shall be~~] is guilty of a misdemeanor and upon  
20 conviction shall be fined not less than fifty dollars (\$50.00)  
21 or more than five hundred dollars (\$500), to which may be added  
22 imprisonment in the county jail for a term not exceeding ninety  
23 days.

24 O. Nothing in this section shall restrict a  
25 claimant from being represented before the workers'

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1 compensation administration by a nonattorney as long as that  
2 nonattorney receives no compensation for that representation  
3 from the claimant. "

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